

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Gurbax Singh
2017-07-03 11:07

ITA No. 122 of 2016 (O&M)
Date of decision: 10.5.2017

The Pr. Commissioner of Income Tax (TDS)-II, Chandigarh

.....Appellant

Vs.

**M/s Mitsubishi Heavy Industries Limited, 12/4, Mathura Road,
Faridabad**

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE HARINDER SINGH SIDHU**

Present: Mr. Yogesh Putney, Senior Standing counsel for the
appellant- revenue.

Mr. Nageshwar Rao, Advocate with Mr. Ashim Aggarwal,
Advocate for the respondent-assessee.

Ajay Kumar Mittal,J.

1. The appellant-revenue has filed the instant appeal under Section 260A of the Income Tax Act, 1961 (in short, “the Act”) against the order dated 30.10.2015, Annexure A.3, passed by the Income Tax Appellate Tribunal, Delhi Bench, ‘E’, New Delhi (in short, “the Tribunal”) in I.T.A. No.2915/DEL/2011 for the assessment year 2009-10, claiming following substantial questions of law:-

“(a)Whether on the facts and in the circumstances of the case, the Hon’ble ITAT is right in law in deleting the penalty levied on the respondent-assessee under Section 221

of the Income Tax Act, 1961, which as per the statutory scheme is mandatory in nature in addition to the amount of arrears and amount of interest etc. and the respondent-assessee after timely deduction defaulted in depositing the amount of tax deducted at source to the credit of the Central Government Account within the time prescribed under Rule 30 of the Income Tax Rules, 1962 read with Section 200 of the Income Tax Act, 1961?”

(b) Whether on the facts and in the circumstances of the case Hon’ble ITAT is right in law in applying second proviso to Section 221 of the Income Tax Act, 1961 while holding that the ignorance and lack of proper understanding of Indian Tax Law on behalf of the respondent-assessee constitutes good and sufficient reason for not levying any penalty under the aforesaid section of the Act?

(c) Whether on the facts and in the circumstances of the case, the Hon’ble ITAT is right in law in deleting the penalty under Section 221 of the Income Tax Act, 1961 by holding that the respondent-assessee has paid the amount of tax deducted at source to the credit of the Central Government Account along with due interest ignoring the true intent and import of the provision inserted in the Explanation to Section 221 of the Income Tax Act, 1961?

(d) Whether on the facts and in the circumstances of the case the Hon’ble ITAT has erred in facts and law in upholding the order of the CIT(A) who found just, sufficient and reasonable cause in the action of the Tax deductor not to deduct taxes due to uncertainty and complexities in the tax provisions as ignorance of the law is no excuse?

(e) Whether on the facts and in the circumstances of the case the findings recorded by the Hon’ble ITAT are perverse and

contrary to the material available on record and not sustainable in the eyes of law?”

2. A few facts relevant for the decision of the controversy involved, as narrated in the appeal, may be noticed. The respondent-assessee is a company registered under the laws of Japan. It sent its employees on secondment to India during the financial year 2008-09. It is holder of tax deduction and collection account No. RTKM05568D. The assessee deducted the tax at source (TDS) amounting to ₹ 2,08,74,770/- on the salaries paid to its employees on secondment to India during the financial year in question and in terms of Section 200 of the Act, the respondent-assessee was under a statutory obligation to deposit the amount of tax deducted at source within the prescribed time limit as laid down under Rule 30 of the Income Tax Rules, 1962 (in short, “the Rules”). The assessee did not deposit the same. On 16.07.2010, the show cause notice under Section 201 read with Section 221(1) of the Act was issued to the assessee for the financial year 2008-09 relevant to the assessment year 2009-10 on account of failure to comply with the provisions of Chapter XVII B of the Act calling upon as to why it be not treated as assessee in default as envisaged under Section 201 of the Act and further as to why the penalty under Section 221 of the Act be not imposed. The assessee was called upon to furnish reply by 03.08.2010 positively. On 10.08.2010, the assessee filed its written reply. It was inter alia submitted that the delay in depositing the tax deducted at source to the credit of the Central Government account was on account of lack of proper understanding of Indian Tax Laws and the compliance required there under. It was further submitted by the assessee that the tax deducted at source had been deposited alongwith interest on 5.06.2009

even before the issuance of show cause notice dated 16.07.2010 under Section 201 read with Section 221(1) of the Act. Vide order dated 10.08.2010, Annexure A.1, the Assessing Officer held that respondent-assessee was deemed to be an 'assessee in default' under Section 201 of the Act and imposed penalty of ₹ 25,00,000/- upon the respondent-assessee under Section 221 of the Act. Aggrieved by the order, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)] against the order of penalty under Section 221(1) of the Act read with Section 201(1) of the Act. The appeal was filed after the expiry of the period of limitation. Vide order dated 14.03.2011, Annexure A.2, the CIT(A) condoned the delay in filing the appeal and allowed the appeal filed by the assessee holding that the issue of tax deducted at source from the salary of non-residents expatriated to India was a debatable issue which was finally concluded by the Apex Court in the case of ***Commissioner of Income Tax Vs. Eli Lilly and Co. (India) Private Limited*** [2009] 312 ITR 225. It was held that no penalty was leviable as the Apex Court had also quashed the penalty proceedings under Section 271C of the Act. Since the issue was debatable and was finally decided on 25.03.2009 by the Apex Court with regard to deduction of tax at source which was a just, sufficient and reasonable cause for the assessee to comply with the provisions of TDS, the appeal was allowed by the CIT(A). Not satisfied with the order, the revenue filed an appeal before the Tribunal against the order passed by the CIT(A), on the ground that the CIT(A) erred in deleting the penalty as the assessee though deducted the tax at source on the salaries paid to its employees did not deposit the amount of tax deducted at source to the credit of Central Government Account within the prescribed time limit as

laid down under Rule 30 of the Rules with read Section 200 of the Act. Vide order dated 30.10.2015, Annexure A.3, the Tribunal dismissed the appeal filed by the revenue and concurred with the findings recorded by the CIT(A). Hence, the instant appeal by the appellant-revenue.

3. We have heard learned counsel for the parties.

4. The issue that arises for consideration in this appeal relates to whether in the facts and circumstances of the case, the CIT(A) and the Tribunal were justified in setting aside levy of penalty amounting to ₹ 25,00,000/- imposed by the Assessing Officer under Section 221 of the Act.

5. Section 221 of the Act deals with penalty payable when tax in default. According to the said provision, when an assessee is in default or is deemed to be in default in making payment of tax, he shall in addition to the amount of the arrears and the amount of interest payable under Section 220(2) be liable, by way of penalty for such an amount as the Assessing Officer may direct and where there is continuing default such further amount or amounts as the Assessing Officer may direct from time to time but the total amount of penalty shall not exceed the amount of tax in arrears. Explanation to Section 221 of the Act provides that penalty may be imposed even if the assessee makes payment of tax before the levy of penalty. However, according to the first proviso to Section 221(1) of the Act, the assessee shall be provided an opportunity of hearing being levy of penalty whereas second proviso to Section 221(1) of the Act states that where assessee proves to the satisfaction of the Assessing Officer that the default was for good and sufficient reasons, no penalty shall be levied under this Section. Thus, the levy of penalty

under Section 22(1) of the Act is subject to the satisfaction of the Assessing Officer and reasonable cause for non compliance. Section 221 of the Act reads thus:-

“Penalty payable when tax in default.

221. (1) When an assessee is in default or is deemed to be in default in making a payment of tax, he shall, in addition to the amount of the arrears and the amount of interest payable under sub-section (2) of section 220, be liable, by way of penalty, to pay such amount as the Assessing Officer may direct, and in the case of a continuing default, such further amount or amounts as the Assessing Officer may, from time to time, direct, so, however, that the total amount of penalty does not exceed the amount of tax in arrears :

Provided that before levying any such penalty, the assessee shall be given a reasonable opportunity of being heard :

Provided further that where the assessee proves to the satisfaction of the Assessing Officer that the default was for good and sufficient reasons, no penalty shall be levied under this section.

Explanation.—For the removal of doubt, it is hereby declared that an assessee shall not cease to be liable to any penalty under this sub-section merely by reason of the fact that before the levy of such penalty he has paid the tax.

(2) Where as a result of any final order the amount of tax, with respect to the default in the payment of which the penalty was levied, has been wholly reduced, the penalty levied shall be cancelled and the amount of penalty paid shall be refunded.”

6. After examining the matter on the basis of the relevant case law on the point, it was concluded by the CIT(A) that there was just, sufficient and reasonable cause before the assessee in not making compliance to the provisions of the TDS as the issue of deduction of tax involved complexity and uncertainty. The CIT(A) also referred to the

judgment in *Eli Lilly and Co. (India) Private Limited's* case (supra) wherein it was held that the liability to penalty under Section 271C can be fastened only on the person who does not have good and sufficient reason for not deducting tax at source. The burden, of course will be on that person to prove such good and sufficient reason. In the present case, the assessee had shown good and sufficient reasons for not deducting tax at source within the prescribed time. Thus, the CIT(A) rightly allowed the appeal filed by the assessee and set aside the order passed by the Assessing Officer. The relevant findings recorded by the CIT(A) read thus:-

“This is no dispute to the fact that the tax actually required to be deducted, has been deducted and paid to the Government account alongwith due interest. But there was certainly delay in depositing the TDS. It has been contended that appellant had no malafide intentions as to non compliance of Indian Tax Laws. All the taxes have suo motto been paid by appellant even before the issue of notice under Section 221(1) by the Assessing Officer and therefore, appellant should not be considered as assessee in default on the ground that the appellant has failed to pay the taxes. However, explanation to Section 221(1) provides that an assessee shall not cease to be liable to any penalty under this sub-Section merely by reason of the fact that before the levy of such penalty he has paid the tax. The explanation to Section 221 provides that penalty may be imposed even if assessee makes payment of tax before the levy of penalty. However, second proviso to Section 221(1) of the Act states that where the assessee proves to the satisfaction of the Assessing Officer that the default was for good and sufficient reasons, no penalty shall be levied under this section. The proviso to Section 201(1) also lays down that no penalty shall be charged under Section 221 from such

person, unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such tax. Thus, the levy of penalty under Section 221(1) is subject to the satisfaction of the Assessing Officer and reasonable cause for non compliance. The learned counsel has relied upon the decision of Hon'ble Supreme Court in the case of ***Hindustan Steel Limited Vs. State of Orissa*** (83 ITR 26), wherein the Hon'ble Apex Court has held that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. However, recently, it has been held by the Hon'ble Supreme court in the case of ***Amit Mohan Bindal (317 ITR 1)*** that the penalty (in the context of Section 271(1)(c)) is a civil liability albeit a strict liability. Irrespective of the fact whether the tax was deducted at source at the time of making payment of salary to the employees and paid beyond prescribed time limits or not deducted at the time of payment of salary but deducted and paid late, there remains no dispute that the appellant was in default in terms of the provisions of Section 201(1) of the Act. The only aspect that is to be seen is whether there was good, sufficient or bonafide reasons for not making compliance to the provisions of law. There is no doubt that the issue of deduction of tax at source from the salary of non-residents expatriated to India has been debatable issue in as much as whether the tax was required to be deducted by their employer abroad while making payment in their country or by their joint venture partners in India. In the context of provisions of Section 192 read with Section 9 of the Act vis-à-vis the deduction of tax at source, the Hon'ble Apex court in the case of ***CIT Vs. Eli Lilly and Co. (312 ITR 225)*** has held that this was the first instance that such an issue was

examined by the Court. The Hon'ble Court also went ahead in holding that where the tax deductor was under a genuine and bonafide belief that it was not under an obligation to withhold taxes, there was no question of imposition of penalty as the assessee had been able to discharge the burden of showing reasonable cause for non deduction of taxes. The Hon'ble Court held that only those persons will be liable to penalty who do not have good and sufficient reason for not deducting the tax. Accordingly, the penalty proceedings under Section 271C were quashed on the ground that the assessee was under a genuine belief not to deduct taxes and therefore, there was a reasonable cause for not imposing penalty. It has been held that for these reasons, no penalty proceedings under Section 271C shall be taken in any of these cases as the issue involved was a nascent issue. The Hon'ble Apex Court has also held that the India Joint Venture Partners were under obligation to deduct tax at source in respect of salary paid by their employer as such salary income was taxable in India by virtue of the provisions of Section 9 of the Act, for having rendered services in India. The case of appellant is that the salary has been paid by their parent employer in Japan in their home country but the services by the expatriate employees were rendered in India by virtue of the joint venture arrangement with L&T Group. It is for these reasons of uncertainty and difficulties involved in several cases that the Hon'ble Supreme Court has quashed penalty proceedings under Section 271C initiated for default of non deduction of tax at source by the Indian joint venture partners. The Hon'ble Court has specifically restricted the action only to the charging of interest for non compliance to the provisions relating to the TDS. Para 38 of the order is reproduced below:

“38. For the reasons mentioned hereinabove, however, no penalty proceedings under Section 271C shall be taken in any of these cases as the issue involved

was a nascent issue. Accordingly, we quash the penalty proceedings under Section 271C”.

When penalty under Section 271C has not been held to be leviable in these facts and circumstances of several cases (104 appeals) involved in the case of Elli Lilly & Co. (India) Private Limited, the default of non payment of TDS is subsequent to the default of non deduction. The Assessing Officer has mentioned in the order that the appellant meticulously deducted tax at source from salary payments to its employees but there is nothing in the order to support such finding of fact. The fact that the amount of tax against each month is mentioned does not alone lead to the conclusion that the tax was actually deducted. This is a case where no deduction of tax was made at the time of payment of salary to expatriate employees but at the time of depositing amount of entire TDS which was almost immediately after the decision of Hon’ble Apex Court in the case of Eli Lilly Co. (India) Pvt. Limited (supra) delivered on 25.03.2009. I find that there was just, sufficient and reasonable cause before the appellant in not making compliance to the provisions of TDS as the issue of deduction of tax involved complexities and uncertainty. Therefore, the order passed by the Assessing Officer in these facts and circumstances of appellant’s case levying penalty of ₹ 25,00,000/- is not sustainable in view of the decision of Hon’ble Supreme Court in the case of Eli Lilly and Company (India) Private Limited (supra). I have gone through the other decisions relied upon by the learned counsel, which more or less support the case of appellant. Hence, the penalty order passed by the Assessing Officer is cancelled.”

7. In appeal, the Tribunal concurred with the findings recorded by the CIT(A) and dismissed the appeal filed by the revenue. Learned counsel for the appellant-revenue has not been able to show any illegality

or perversity in the findings recorded by the CIT(A) which have been affirmed by the Tribunal. Consequently, no substantial question of law arises and the appeal stands dismissed.

(Ajay Kumar Mittal)
Judge

May 10, 2017
‘gs’

(Harinder Singh Sidhu)
Judge

Whether speaking/reasoned

Yes

Whether reportable

Yes